HANIFAH HAMZAH & ORS v. SYARIKAT UTUSAN MELAYU (MALAYSIA) BHD (DALAM PENGGULUNGAN SUKARELA PEMIUTANG) & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
AZIMAH OMAR JCA
SM KOMATHY SUPPIAH JCA
[CIVIL APPEAL NOS: W-01(A)-5-01-2022, W-01(A)-6-01-2022, W-02(A)-2042-11-2021 & W-02(A)-2043-11-2021]
15 JULY 2024

Abstract – *(i) Section 451(2) of the Companies Act 2016 ('CA') is a mandatory provision that requires all claims against a company under liquidation to be recovered in the winding-up only, except with the leave of the court. This is to ensure that all actions and proceedings against the company are dealt with in one forum, minimising costs and preventing multiplicity of actions. Section 20(3) of the Industrial Relations Act 1967 is a general provision that allows the Minister of Human Resources to refer representations of unfair dismissal to the Industrial Court. However, when a winding-up order has been made, s. 451(2) of the CA takes precedence. The Minister must then ensure that a claimant has obtained leave from the winding-up court before referring his claim to the Industrial Court; (ii) By lodging his proofs of debt with the liquidator, a claimant loses his right to go to the Industrial Court. His remedy, if he is dissatisfied with the decision of the liquidator, is to appeal against the liquidator's decision to the High Court.*

ADMINISTRATIVE LAW: *Judicial review – Appeal – Appeal against decision of High Court – Company in liquidation and ceased operations – Employees terminated – Terminated employees lodged representations to Director General of Industrial Relations ('DGIR') – DGIR referred matter to Minister of Human Resources ('Minister') – Minister referred representations to Industrial Court – Judicial review against decision of Minister – Whether Minister exercised discretion in accordance with law – Whether employees should have obtained prior leave of winding up court – Whether employees, having lodged proofs of debt with liquidator, barred from instituting proceedings in Industrial Court against company – Companies Act 2016, s. 451(2) – Industrial Relations Act 1967, s. 20(3)*

A ***COMPANY LAW:*** *Liquidation – Proceedings against company in liquidation – Company ceased operations and terminated employees – Terminated employees lodged representations to Director General of Industrial Relations ('DGIR') – DGIR referred matter to Minister of Human Resources ('Minister') – Minister referred representations to Industrial Court – Whether Minister acted in accordance with*
B *law – Whether employees should have obtained prior leave of winding up court – Whether employees, having lodged proofs of debt with liquidator, barred from instituting proceedings in Industrial Court against company – Companies Act 2016, s. 451(2)*

INDUSTRIAL LAW: *Procedure – Representations – Company in liquidation and*
C *ceased operations – Employees terminated – Terminated employees lodged representations to Director General of Industrial Relations ('DGIR') – DGIR referred matter to Minister of Human Resources ('Minister') – Minister referred representations to Industrial Court – Whether Minister acted in accordance with law – Whether employees should have obtained prior leave of winding up court –*
D *Industrial Relations Act 1967, s. 20(3)*

The respondent, a company, was unable to continue its business by reason of its liabilities. An interim liquidator was accordingly appointed. Following the liquidation of the respondent, it ceased its operations which, in turn, led to the termination of all the employees including the appellants. The
E appellants then lodged a representation to the Director General of Industrial Relations ('DGIR') on their termination from the respondent. As the reconciliation meetings between the appellants and the liquidator of the respondent bore no success, the DGIR referred the matter to the Minister of Human Resources ('Minister'). The Minister then referred the appellants'
F representations to the Industrial Court, pursuant to s. 20(3) of the Industrial Relations Act 1967 ('IRA') ('decision of the Minister'). The respondent commenced a judicial review, at the High Court, against the decision of the Minister. The High Court quashed the decision of the Minister, holding that the appellants were bound by the liquidation process and could not have their
G claims addressed in the Industrial Court without the prior leave of the court. Hence, the present appeals. The issues that arose for adjudication were: (i) whether the Minister exercised his discretion in accordance with the law when he referred the appellants' claims for unfair dismissal to the Industrial Court, pursuant to s. 20(3) of the IRA, when the appellants had not obtained the prior leave of the court under s. 451(2) of the Companies Act 2016
H ('CA'); and (ii) whether the appellants, having lodged proofs of debt with the liquidator, were barred from instituting proceedings in the Industrial Court against the respondent.

Held (dismissing appeals)
I **Per SM Komathy Suppiah JCA delivering the judgment of the court:**

(1) Section 451(2) of the CA is couched in mandatory language. It stipulates that no action or proceedings could be brought against the company in

liquidation except with the leave of the court. It requires all claimants against a company under liquidation to recover their monetary claims in the winding up only, except with the leave of the court. This is to bring all actions and proceedings against the company before one forum so that they could be conveniently and expeditiously dealt with, while minimising costs and preventing multiplicity of actions which may result in the assets of the company being dissipated. Section 451(2) of the CA must be read together with s. 20(3) of the IRA and the former, being a more specific provision which deals with when proceedings could be instituted against a company when a winding up order has been made, prevails over s. 20(3) of the IRA, a general provision. The Minister had acknowledged, at the material time, that he knew that the respondent had been wound up and the appellants had lodged proofs of debt with the liquidator. The Minister erred in law and exceeded the power given to him, under the IRA, in referring the appellants' claims to the Industrial Court without ensuring that the appellants had first obtained leave from the winding up court. Therefore, the trial judge was correct in holding that, pursuant to s. 451 of the CA, the appellants' claims could only be recovered in the winding up proceedings and could not be recovered by other means except with leave of the court. (paras 13, 16 & 17)

(2) All the appellants (save for two) had filed their proofs of debt with the liquidator and, in the proofs of debt, the appellants sought various reliefs, including termination benefits and compensation *in lieu* of termination notice. By lodging their proofs of debt, the appellants had lost their right to go to the Industrial Court. As these claims were capable of being proved in the liquidation and were pending adjudication at the time, the appellants were bound by the liquidation process. Their remedy, if they were dissatisfied with the decision of the liquidator, was to appeal against the liquidator's decision to the High Court, as provided under the CA. (paras 18 & 22)

Case(s) referred to:

Craven v. Blackpool Greyhound Stadium & Racecourse Ltd [1936] 3 All ER 513 ***(refd)***

Isuta International Sdn Bhd & Ors v. Mahkamah Perusahaan Malaysia & Anor [2013] 8 CLJ 1040 HC ***(refd)***

Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo [2019] 10 CLJ 731 FC ***(refd)***

Mariana Ghazali & Ors v. Co-Operative Central Bank Ltd (In Receivership) & Other Cases [1989] 2 ILR 497 ***(refd)***

Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] CLJU 47; [1985] 1 LNS 47 SC ***(refd)***

Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 9 CLJ 177 FC ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 226(3)
Companies Act 2016, ss. 451(2), 456, Eleventh Schedule, Twelfth Schedule
Industrial Relations Act 1967, s. 20(3)

For the appellants - Tan Chong Lii, Abd Halim Abdul Karim & Earn Karim; M/s Mazri Halim & Partners

For the respondent - Afdhilani Jusoh, Rajvinder Singh Singh & Sera Foong Chui-Yeng; M/s Dennis Nik & Wong

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review Nos: WA-25-322-11-2020, WA-25-330-11-2020 & Civil Summons Nos: WA-28PW-414-10-2020 & WA-28PW-436-11-2020 (affirmed).]

Reported by Najib Tamby

JUDGMENT

SM Komathy Suppiah JCA:

Introduction

[1] There are four appeals before us. The appellants are former employees of the respondent company. These appeals have arisen as a result of the termination of the appellants when the respondent ceased business when it was placed under creditors' voluntary liquidation. Following their termination, the appellants instituted proceedings against the respondent in the Industrial Court, seeking relief for unfair dismissal.

Background Facts

[2] The background facts are comprehensively set out in the submissions of the parties and we adopt the same.

[3] On 7 October 2019, the Board of Directors of the respondent declared that the respondent was unable to continue its business by reason of its liabilities and Datuk Tee Guan Pian was appointed as the interim liquidator for the respondent.

[4] Subsequently, a members' and creditors' meetings were held separately on 6 November 2019, whereas Datuk Tee Guan Pian has been appointed as the liquidator of the respondent.

[5] On 19 December 2019, following the respondent's application to the court *vide* Originating Summons No: WA-24NCC-678-12-2019, approval was granted to the liquidator pursuant to s. 456 of the Companies Act 2016 read together with the Eleventh Schedule to exercise all functions and powers of the liquidator provided under Part I and II of the Twelfth Schedule of the CA.

[6] Pursuant to the liquidation of the respondent on 7 October 2019, it ceased its operation, which in turn led to the termination of all the employees, including the appellants herein. The appellants lodged a representation to the Director General of Industrial Relations on their termination from the respondent.

[7] The Director General of Industrial Relations, upon receipt of the representation, called for reconciliation meetings between the appellants and other ex-employees (in a separate meeting) with the liquidator of the respondent, but was unsuccessful. Thereafter, the Director General of Industrial Relations referred the matter to the Minister of Human Resources ("Minister").

[8] *Vide* letter dated 4 August 2020, the Minister decided for the representations of the appellants to be referred to the Industrial Court under s. 20(3) of Act 177.

Issues Raised On Appeal

[9] The two main issues in these appeals are first, whether the Minister exercised his discretion in accordance with the law when he referred the appellants' claims for unfair dismissal to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 ("IRA") when the latter had not obtained the prior leave of the court under s. 451(2) of the Companies Act 2016 ("CA"). The second issue is whether the appellants, having lodged proofs of debt with the liquidator, are barred from instituting proceedings in the Industrial Court against the respondent.

[10] On the first issue, the appellants contend that the Minister had acted in accordance with the law as no leave is required under s. 20(3) of the IRA for the appellants to institute proceedings against the respondent. In any event, they argue that s. 20(3) of the IRA is not subject to or controlled by s. 451 of the CA as it is a specific provision as opposed to s. 451, a general provision. They also contend that s. 451 of the CA does not apply to tribunals like the Industrial Court but only to civil courts. In support of their proposition that leave is not required, the appellants rely on the decision of the Industrial Court in *Mariana Ghazali & Ors v. Co-Operative Central Bank Ltd (In Receivership) & Others Cases* [1989] 2 ILR 497.

[11] Section 20(3) of the IRA provides:

> Where the Director General is satisfied that there is no likelihood of the representation being settled under subsection (2), the Director General shall refer the representations to the Court for an award.

[12] Section 451 of the CA provides:

A (1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditors' voluntary winding up shall be void.

(2) After the commencement of the winding up, no action or proceeding shall be proceeded with or commenced against the
B company except by leave of the Court and subject to such terms as the Court may impose.

[13] Section 451(2) of the CA is couched in mandatory language. It stipulates that no action or proceedings can be brought against the company in liquidation except with the leave of the court. It requires all claimants
C against a company under liquidation to recover their monetary claims in the winding up only, except with the leave of the court. This is to bring all actions and proceedings against the company before one forum so that they can be conveniently and expeditiously dealt with, while minimising costs, and preventing a multiplicity of actions which may result in the assets of the
D company being dissipated.

[14] We turn now to examine the case of *Mariana Ghazali*, upon which the appellants rely on strongly. There, counsel for the receivers raised a preliminary objection in the Industrial Court that since the receivers were appointed by the High Court, proceedings against them may not be instituted
E without the leave of the court. The Industrial Court held that no leave was required. On appeal, the decision was affirmed by the Supreme Court.

[15] In our view, that case has no application to the present case, as the company in that case, was not under liquidation but under receivership. In any event, only the written grounds of the Industrial Court Chairman,
F Mr W Satchithanandhan, is available. The Supreme Court in dismissing the appeal against his decision did not provide written grounds for its decision. It is thus not known whether the Supreme Court affirmed the decision of the Industrial Court on the grounds other than those relied on by the lower courts. It is trite that an unwritten decision of a higher court, whether sitting
G in its original or appellate jurisdiction, binds the parties to the action but is not authority for any principle or rule of law and does not bind the lower courts. See *Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 9 CLJ 177; [2019] 6 MLJ 1 and *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731; [2020] 1 MLJ 440.

H **[16]** Having considered all the submissions on this issue, we share the judges' view that s. 451(2) of the CA must be read together with s. 20(3) of the IRA and the former being a more specific provision which deals with when proceedings can be instituted against a company when a winding up order has been made, prevails over s. 20(3) of the IRA, a general provision.
I We find that the view expressed by Varghese George J in *Isuta International*

Sdn Bhd & Ors v. Mahkamah Perusahaan Malaysia & Anor [2013] 8 CLJ 1040 on the interpretation to be given to s. 226(3) of the CA 1965, now s. 451(2) of the CA, is a correct statement of the law on the subject. It held that leave of the winding up court is required before a claimant can commence proceedings in the Industrial Court against a company that has been wound up. His Lordship explained:

> [20] The words 'action or proceeding' (taken separately or together, irrespective) as found in s. 263(2) (or for that matter in s. 226(3)) of the COA), must also be accorded a meaning not in isolation but in the context of the totality of the subject provision. Read in that context it followed then that the words 'action or proceeding' referred to some mode or step adopted or taken in the judicial arena to enforce a legal right or where some form of 'adjudication' of interest was involved. A clearance from the High Court by way of leaves was necessary to commence or proceed with that 'action or proceeding' when it was brought against a company where a creditors' winding-up, whether voluntary or compulsory was underway.
>
> In *Words, Phrases and Maxims Legally and Judicially Defined* by Anandan Krishnan (vol. 12) the following meanings ascribed to the word proceeding are found:
>
> > The term 'proceeding' is very comprehensive and generally speaking means a prescribed course of action for enforcing a legal right ...
> >
> > Proceeding is a prescribed course of action for the enforcement of a legal right ... The words is wider in amplitude than the words 'case'. It may also include administrative proceedings ...
>
> [21] In my reading therefore, the words 'action or proceeding' here in s. 263(2), had a wide reach to encompass and cover all types of proceedings before a court, or a tribunal or similar adjudicatory bodies vested with judicial or *quasi*-judicial powers. The common denominator that had to be applied was whether that forum in question, handling such action or proceeding, was discharging duties to settle disagreements or complaints properly brought or laid before it in accordance with relevant law.
>
> The Industrial Court was most definitely one such adjudicatory body statutorily entrusted to deal with industrial relations complaints, subject to the provision of the IRA. It followed then that all proceedings before the IC brought against a company under process of creditors' winding-up, were caught within ss. 226(3) or 263(3) of COA (as the case maybe) and 'leave' was a prerequisite for that matter or even for any application within that proceeding, to be further proceeded with or progressed.

[17] The Supreme Court in *Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9 held that the Minister's discretion under s. 20(3) of the IRA is wide but not unlimited. In the present case, the Minister acknowledged that at the material time, he knew that the respondent had been wound up and the appellants had lodged proofs of debt with the liquidator. We agree with the trial judge that the Minister erred in law and exceeded the power given to him under the IRA in referring the appellants' claims to the Industrial Court without ensuring that the appellants had first obtained leave from the winding up court. We therefore hold that the trial judge was correct in holding that pursuant to s. 451 of the CA, the appellants' claims can only be recovered in the winding up proceedings and cannot be recovered by other means except with leave of the court.

[18] That brings us to the second ground of appeal, about which the parties are fundamentally at odds. It has to do with consequences of the lodging proofs of debt. The facts relevant to this ground are these. All the appellants, save and except for Ahmad Haziq bin Mad Shah and Lukman bin Ismail, filed proofs of debt with the liquidator. In the proofs of debt, the appellants have sought for various reliefs, including termination benefits and compensation *in lieu* of termination notice.

[19] It is the appellants' contention that the High Court erred in holding that the appellants by lodging proofs of debt, had elected for their claims to be adjudicated upon by the liquidator and subjected themselves to the winding up process. They contend that the submission of the proofs of debt does not preclude them from seeking redress for their wrongful and unjust dismissal in the Industrial Court as it is only the Industrial Court that can determine on the fairness and legality of their dismissal and the remedies they are entitled to.

[20] On this issue, we refer to the decision of the Court of Appeal in *Craven v. Blackpool Greyhound Stadium & Racecourse Ltd* [1936] 3 All ER 513. There, a director of a limited company, which went into voluntary liquidation, filed a proof of debt in the liquidation in respect of arrears of salary and damages for dismissal. The director, unhappy with the quantum awarded by the liquidator, instituted an action in court for damages against the company. In staying the action, Greer LJ held:

> The creditor was dissatisfied with the amount that had been awarded to him and, after the decision of the liquidator and after he had made up his mind not to take advantage of the provisions of the statute and the rules which entitled him to question the decision of the liquidator by an appeal to a judge in the Chancery Division, he decided that he would like another form of decision, namely, an action for damages in the King's Bench Division, ... it is common knowledge in these matters that the court does not allow two sets of proceedings to go on at the same time in the

> same matter; it will stay either one or the other in order that there may not be a waste of costs in asking two tribunals to decide the same question.
>
> I think it sufficient to say that the respondent in this case, having selected one method of having his claim adjudicated upon, which gives him the right to question the decision of the liquidator, ought not then to be in a position to select another method which, in my judgment, would have no result because, even if Hilbery J gave him a larger sum than the liquidator had given him, the adjudication by the liquidator would still remain an adjudication which, until it was reversed by a judge in the Chancery Division, would have been binding in the winding up. I think, for these reasons, the learned judge exercised his discretion without due regard to the fact that there had been a claim made in the winding up adjudicated on by the liquidator, though subject to appeal, and, in those circumstances, he really had no option but to stay the proceedings at common law and leave the creditor to his rights in the winding up proceedings.

[21] Greer LJ's statement of principle, in our view, correctly represents the law on the issue. Applying this principle to the facts of this case, it is our judgment, that by lodging their proofs of debt, the appellants have lost their right to go the Industrial Court. As noted earlier, the appellants have, in their claims to the liquidator, sought for many reliefs, including termination benefits and compensation *in lieu* of termination. As these claims were capable of being proved in the liquidation, and were pending adjudication at the time, the appellants were bound by the liquidation process. Their remedy, if they are dissatisfied with the decision of the liquidator, is to appeal against the liquidator's decision to the High Court as provided under the CA.

[22] We pause here to observe, that the main reason for the termination of the employment of the appellants was due to the respondent being under the process of liquidation and being unable to continue its business by reason of its liabilities. In these circumstances, it cannot be gainsaid that the remedy of reinstatement is no longer available to the appellants and the only remedy the appellants can seek in the Industrial Court is confined to monetary compensation, which can be dealt with adequately with in liquidation process. The Supreme Court in *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] CLJU 47; [1985] 1 LNS 47; [1985] 2 MLJ 446 held that a monetary claim can only be recovered in the liquidation and cannot be recovered by other means except with leave of the court.

[23] We thus reject the appellants' contention that they are entitled to refer their dispute to the Industrial Court regardless of whether or not they had submitted proofs of debts. Having chosen to enforce their claim by submitting proofs of debt, they are bound by the liquidation process.

A **[24]** In the circumstances, we see no reason to disturb the decisions which are being appealed against. We agree with the High Court's reasons for quashing the decision of the Minister and holding that the appellants are bound by the liquidation process and cannot have their claims addressed in the Industrial Court without the prior leave of the court.

B **[25]** For the reasons given, we dismiss the appeals. The appellants are to pay costs of RM10,000 to each respondent.

C

D

E

F

G

H

I